

Why Movie Studios Care About Right of Publicity

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Thank you, Professor Besek. I am honored to be here today. As Professor Besek mentioned, I am an attorney in-house at the Motion Picture Association of America. Just so that we are all on the same page about what that is and who we represent, we are the trade association for the six major motion picture studios here in the United States. As of today, that comprises Fox, Sony Pictures, Paramount, Warner Brothers, Disney, and NBC Universal.

So why do movie studios care about the right of publicity? The answer is quite simple. Our studios make lots of movies and television programs about and inspired by real people and events. It is critical to our studios that they have the right to do that—whether or not the subjects of those movies and television shows want movies or television shows made about them.

To illustrate how important this issue is to our studios in present day, let me say a couple things. The word “copyright” is included in my job title. I am mostly a copyright lawyer, and I think that is why I was hired at the Motion Picture Association. But over the last two to three years, I have spent the majority of my time on right of publicity, more so than on issues involving copyright. My counterparts—the intellectual property lawyers in-house at the movie studios—consider court decisions threatening their right to make movies and television shows about and inspired by real people and events, without obtaining the subjects’ permission, “existential threats.” One of the things that Professor Jennifer Rothman mentioned in her remarks is that we need to do a better job articulating what the nature of this threat is, or what it means as a practical matter.¹ Let me take up the baton and try to give you a sense of just how fundamentally important this issue is in current years.

I did a little bit of light data crunching here and looked at the Academy Award nominees for Best Picture over the last five years. Either eight or nine were nominated each year. According to my calculations, twenty of those forty-three, or

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1. Jennifer E. Rothman, *The Right of Publicity’s Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277 (2019).

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about 47% of Best Picture nominees over the last five years, were about or inspired by real people and events. Consider what movies would have been threatened if the rule is that you cannot make a movie or TV show about somebody unless you get their permission. In 2017: *Darkest Hour*, *Dunkirk*, *The Post*. In 2016: *Hacksaw Ridge*, *Hidden Figures*, and *Lion*. In 2015: *Spotlight*, *The Big Short*, *Bridge of Spies*, and *The Revenant*. In 2014: *American Sniper*, *The Imitation Game*, *Selma*, and *The Theory of Everything*. And in 2013: *12 Years A Slave*, *American Hustle*, *Captain Phillips*, *Dallas Buyers Club*, *Philomena*, and *The Wolf of Wall Street*.

In some of those cases, there may have been cooperation between the filmmakers and the subject, but in many of them there was not. Think about a film like *The Social Network*, a nominee in 2010, which told the story of the founding of Facebook, and focused on its founder, Mark Zuckerberg. That was by no means a positive portrayal of Mr. Zuckerberg. The movie actually hewed very closely to the facts—much of the dialogue was lifted directly from deposition testimony and other things where we had a very good record of what happened. But, if the rule were that you cannot make a movie about someone unless you get my permission, there is absolutely no way that movie would have been made. Or, at the very least, there is no way that the movie would have gotten made in the way that it was, telling the story in the way that it did. Audiences would be left with milquetoast portrayals that frankly would not be particularly compelling.

I will wrap up by talking about what the MPAA sees the best way to protect our ability to tell those kinds of stories. There are various ways, various possibilities. One option is via the courts, to make the best First Amendment arguments you can, and hope the decision comes out in your favor. We do that. But it is our contention that the best way is to return to the statute and have specific carve outs for expressive works, which would include books, movies, television shows, plays, songs, newspaper articles, news broadcasts, et cetera. The first statute that incorporated such an expressive works exemption was the California Post Mortem Statute, California Civil Code 3344.1.² As far as I am aware, that was the first state statute to actually incorporate a specific statutory exemption for expressive works. I should mention that language was actually negotiated between the MPAA and SAG. This language exempts everything in “a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works.”³

Beginning with California in 1999, there have been a number of other states that have either enacted brand new right of publicity statutes or amended old ones. The MPAA has worked hard to get similar language in all of those bills. Arkansas passed a new bill in 2016,⁴ South Dakota based a new bill in 2015,⁵ Alabama passed a bill in 2015.⁶ Then there are a number of other states that have tried over the last several

2. CAL. CIV. CODE § 3344.1 (1999).

3. CAL. CIV. CODE § 3344.1(a)(2) (1999).

4. ARK. CODE § 4-75-1101 (2016).

5. S.D. CODIFIED LAWS § 21-64-2 (2015).

6. ALA. CODE § 6-5-770 (2015).

sessions but have not quite made it. I think many people are aware that in New York, there was a right of publicity bill introduced that passed the Assembly earlier this spring but did not make it out of the Senate.⁷ In Massachusetts, Bill Cosby was a chief proponent of the bill back in 2015, but that effort died for reasons I think most people will understand.⁸ There have also been efforts in Louisiana that haven't progressed terribly far at the moment⁹ and then right after Prince died in Minnesota back in 2016 there was a rather hasty effort to pass a new bill.¹⁰ We, and others, raised some concerns, so that did not pass at the time.

There are a lot of other issues we can get into, but again, this is not a minor issue for our studios. As I mentioned, they view laws or court rulings that would limit their ability to make movies and TV shows about real people and events as "existential threats" to their existence and their way of doing business and making movies at the moment, and it is right at the top of our priority list now and probably will be for several years to come.

7. Judy Bass, *New York Right of Publicity Bill Passage Drama Ends with No Action by State Senate*, N.Y. STATE BAR ASS'N: THE ENTMT, ARTS & SPORTS L. BLOG (June 25, 2018, 9:28 AM), <https://perma.cc/LLQ9-LY85>.

8. *Massachusetts*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://perma.cc/EY2J-FVCG> (last visited Mar. 1, 2019).

9. *Louisiana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://perma.cc/9KZG-V4VV> (last visited Mar. 1, 2019).

10. Jennifer E. Rothman, *Prince's Death Sends Minnesota Legislature into Overdrive*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (May 10, 2016, 9:00 AM), <https://perma.cc/AE94-6VG8>.